

4. A Requirement for Restriction/Election was mailed on March 13, 2007.

5. The response to the Requirement for Restriction/Election was filed on April 4, 2007, which was within the one-month shortened statutory period for reply.

6. A non-final Office action was mailed on June 14, 2007.

7. The response to the non-final Office action was filed on October 11, 2007, which was 27 days after the end of the three-month shortened statutory period for reply.

8. A final Office action was mailed on January 4, 2008.

9. A Request for Continued Examination was filed on May 5, 2008, which was 31 days after the end of the three-month shortened statutory period for reply.

10. A non-final Office action was mailed on August 6, 2008.

11. The response to the non-final Office action was filed on February 6, 2009, which was 92 days after the end of the three-month shortened statutory period for reply.

12. A Notice of Allowance was mailed on June 10, 2009, which was four days after the four-month period for responding to a reply.

According to 35 U.S.C. § 154(b), the term of a patent may be extended by one day for every day of Office delay specified by 35 U.S.C. § 154(b) (1) (A) ("Period A" type delays). Also, under 35 U.S.C. § 154(b) (1) (B), the term of a patent may be extended by one day for every day of delay caused by the Office in issuing a patent more than three years after the filing date, not including any time consumed by continued examination of the application requested by the applicant ("Period B" type delay).

Under 35 U.S.C. § 154(b) (2) (C), the period of adjustment of the term is reduced by a period equal to the period of time during which the applicant failed to engage in reasonable

efforts to conclude prosecution of the application. Moreover, to the extent that Period A and Period B type delays overlap, the period of any adjustment may not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b) (2) (A).

The patent term adjustment (PTA) calculated by the Office for the subject application as stated on the Notice of Allowance is 484 days. This calculation is based on the Period A type delays on the part of the Office of 634 days, reduced by 150 days of applicant delay. Figure 1, attached hereto, shows the Office's PTA calculation.

Applicant respectfully submits that the Office has failed to consider any Period B delay on the part of the Office in the in its calculation of PTA. Under the holding of *Wyeth v. Dudas*, 88 U.S.P.Q. 2d, 1538 (D.D.C. 2008), accumulation of PTA under a Period B type delay does not start until the day after the date that is three years after the filing date. Therefore, Period B type delay cannot overlap with Period A type delays until three years after the filing date of the application.

Period B type delay was not considered in the Office's PTA calculation for the subject application. As shown on attached Figure 2, the unaccounted for Period B type delay on the part of the Office was 566 days. The Period B type delay was calculated from the period of time from the day after the date that is three years after the filing date (October 17, 2006) until the filing of the Request for Continued Examination (May 5, 2008).

Applicant respectfully submits that the correct total Office delay, in view of the holding in *Wyeth v. Dudas*, should be the sum of the Period A type delays and the Period B type delay, which is 1,200 days. Therefore, the resulting PTA is the total Office delay (1,200 days) reduced by applicant's delay

(150 days), which is 1,050 days. As shown on Figure 2, none of the Period A type delays overlap with the Period type B delay.

In view of the above calculation applying the holding in *Wyeth*, Applicants request the Office to increase the PTA by 566 days. This correction will bring the total PTA to 1,050 days.

No terminal disclaimer was filed in this case.

A petition fee of \$200.00 under 37 C.F.R. §1.18(e) is submitted herewith. However, if additional fees are due, the commissioner is hereby authorized to charge the required fee to Deposit Account 19-1345.

Respectfully submitted,

/Andrew C. Wegman/

Andrew C. Wegman, Reg. No. 54,530
SENNIGER POWERS LLP
100 North Broadway, 17th Floor
St. Louis, Missouri 63102
(314) 345-7000

ACW/PDT

* Attachment

The following reference characters are used in Figs. 1 and 2 below:

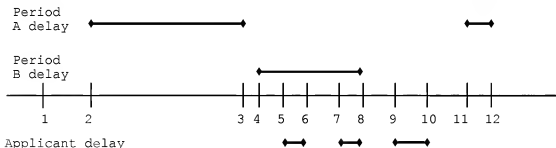
1. Filing date: 10/16/2003
2. Date of 14th month after filing: 12/16/04
3. Date of the first Office action: 09/07/2006
4. Date that is three years after the date on which the application was filed: 10/17/06
5. Date of three-month shortened statutory period for reply to non-final Office action dated 6/14/2007: 09/14/2007
6. Response to non-final Office action: 10/11/2007
7. Date of three-month shortened statutory period for reply to final Office action: 04/04/2008
8. Request for Continued Examination: 05/05/2008
9. Date of three-month shortened statutory period for reply to non-final Office action dated 8/6/2008: 11/06/2008
10. Response to non-final Office action: 02/06/2009
11. Date of 4th month after response to Non-Final Office Action: 06/06/2009
12. Notice of Allowance mailed: 06/10/2009

Figure 1: Office's PTA calculation



$$\text{PTA} = \text{PTO Period A delay (634)} - \text{Applicant delay (150)} = 484.$$

Figure 2: Applicant's PTA calculation in light of *Wyeth v. Dudas*



$$\text{PTA} = \text{PTO Period A delays (634)} + \text{PTO Period B delay (566)} - \text{Applicant Period A delay (150)} = 1,050 \text{ days}$$